DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER: 99-0375 & 99-0490
Gross Income & Sales/Use Tax
For the Years 1996, 1997, 1998

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ISSUES

I. Withholding- Application to out-of-state contractors

Authority: IC 6-2.1-6-1; IC 6-2.1-3; 45 IAC 1-1-213; 45 IAC 1-1-121; 45 IAC 1-1-124; *Complete Auto Transit,Inc. v. Brady*, 430 U.S. 274 (1977)

Taxpayer protests the Department's assessment of the gross income tax on payments for an amusement park ride to a non-resident contractor.

II. Sales/Use Tax – Application to income from lockers

Authority: IC 6-2.5-2-1; IC 6-2.5-3-1; IC 6-2.5-4-1; IC 6-2.5-4-4; IC 6-2.5-4-10

Taxpayer protests the Department's assessment of the sales/use tax on Taxpayer's locker rentals.

III. Sales/Use Tax – Application to shuttle bus

Authority: IC 6-2.5-5-27; 45 IAC 2.2-3-22, 45 IAC 2.2-5-61; *Panhandle Eastern Pipeline Company v. Indiana Department of State Revenue*, 741 N.E.2d 816 (Ind. Tax Ct. 2001)

Taxpayer protests Department's assessment of the sales/use tax on the Taxpayer's shuttle bus.

STATEMENT OF FACTS

The Taxpayer is an amusement resort located in Indiana. A majority of the accommodations are within a short walking distance from the attractions and amusements. Guests may stay at a cottage, inn, motel, or suite and receive free passes for general admission to the park. A private swimming pool, camping, and cabins are also available. Shuttle buses are available to transport

guests to and from the campground. There are 26 adult rides and 9 kiddy rides as well as a wide variety of gift, souvenir, and sportswear shopping.

Some of the Taxpayer's operations are leased to independent contractors. These operations include most of the concession stands, games of chance, and souvenir stands. The operators of these facilities pay a percentage of their gross revenue to the taxpayer, which is classified as concession revenue.

An examination of the taxpayer's method of collecting and remitting withholding tax was conducted. The examination revealed that, during 1998, the Taxpayer purchased an amusement ride from a Florida corporation. The manufacturer billed the Taxpayer separately for the "labor and material to construct the ride." Taxpayer paid use tax on the portion of the bill identified as material. The ride was constructed in Florida, shipped to Indiana, and then installed by the manufacturer at the Taxpayer's Indiana business location. The manufacturer is a regular "C" corporation which is not qualified with the Indiana Secretary of State to conduct business within Indiana. Manufacturer has also never filed an Indiana income tax return.

In addition, the Taxpayer provides lockers for rent so that individuals can store their clothes while swimming. Taxpayer did not collect sales and use tax on these rentals of tangible personal property. Furthermore, during 1996, the Taxpayer purchased a shuttle bus. The bus was used to transport individuals to and from the park to their accommodations. No tax was paid to the vendor or the Bureau of Motor Vehicles on the purchase of the bus.

I. Withholding- Application to out-of-state contractors

DISCUSSION

Taxpayer argues that to impose withholding is improper as Taxpayer allegedly falls under an exception to the withholding requirement. Alternatively, Taxpayer argues that the imposition of the withholding tax is in violation of the Commerce Clause of the U.S. Constitution. The Taxpayer argues that taxing the purchase and subsequent installation of the ride is in violation of the Commerce Clause as the purchase is alleged to be solely within interstate commerce.

The Indiana Code provides for withholding tax in this situation, and IC 6-2.1-6-1 states in relevant part:

> (a) As used in this section, "nonresident contractor" does not include a foreign corporation qualified to do business in Indiana.
> (b) Except as provided in subsection (c), each calendar year each individual, firm, organization, or governmental agency of any kind who makes payments to a nonresident contractor for performance of any contract, except contracts of sale, shall withhold from such payments the amount of gross income tax owed upon the receipt of those payments under this article. When withholding the gross income tax, the withholding agent shall compute the amount owed by applying the highest rate applicable under IC 6-2.1-2 to any portion of the payments.

As such the manufacturer meets the definition of a nonresident contractor as defined by both IC 6-2.1-6-1 and 45 IAC 1-1-214. The administrative regulations provide guidance in this area as well. 45 IAC 1-1-213 provides in relevant part:

> Withholding for Gross Income Tax Purposes Indiana gross income tax is required to be withheld from any and all payments made to a nonresident contractor for performance of any work or services which are taxable to the State of Indiana. The withholding will be made at the higher rate under IC 6-2-1-3(g) on all payments made during the year to an nonresident contractor which exceeds the sum of $1,000.

At the time of the purchase of the ride, 45 IAC 1-1-121 stated in relevant part:

> Sec. 121 Income from the Performance of a Contract or Service. Gross income derived from the performance of a contract or service within Indiana is subject to gross income tax. Below is a list of some of the situations, which have arisen in dealing with service income, with an indication of the taxability of each: . . .
> (c) Gross receipts from contracts entered into by nonresidents to furnish and install tangible personal property in Indiana are subject to gross income tax. See Holland Furnace Co. v. Department of Treasury, 133 F.2d 212 (7th Cir., 1943), cert. Denied, 320 U.S. 746 (1943). The problem with these and similar cases (see Regulation 6-2-1-7(a)(030) *[45 IAC 1-1-120; now 45 IAC 1.1-3-3]*, Gross Income Tax Div. V. Surface Combustion Corp. *supra*) is in deciding if the contract is simply one of sale with incidental services taking place within the State, which may be tax-exempt as a transaction in interstate commerce, or one of service which is taxable if it takes place in Indiana. The Department interprets the relevant court decisions to mean that whenever a product is shipped in parts as a convenience to transportation and the seller then assembles it or supervises assembly on the customer's premises, the transaction is a sale if the following conditions are met: Installation consists of no more than setting the product on bases or connecting it to pipes, wires, supports, etc., provided by the customer; the product remains personal property after installation; the property is suitable for sale to other customers in the regular course of the seller's business; and the service necessary to installation is of such a technical nature that only the seller is capable of providing the necessary skilled workmen. *If these conditions are not met or if, in addition to assembly, the seller performs additional services, such as installation, testing,*
>
> *construction, etc., the transaction will not be considered a sale, but will be treated as a construction contract. . . (emphasis added).*

The Taxpayer relies on the idea that the purchase and subsequent installation of the ride was a single "contract of sale," and thus, falls under the exception to the withholding requirement set forth under IC 6-2.1-6-1. This argument is faulty, as the Taxpayer has offered no proof that the shipment of the ride to Taxpayer only involved the mere assembly without installation, testing, or construction. Indeed, the record indicates taxpayer paid use tax on only a portion of the

purchase price of the item, breaking out the associated labor costs for the assembly and delivery of the equipment- including information on the portions of the labor costs for the out-of-state location and Indiana.

IC 6-2.1-3-3 requires in relevant part "Gross income derived from business conducted in commerce between the state of Indiana and either another state or a foreign country is exempt from gross income tax to the extent the state of Indiana is prohibited from taxing that gross income by the United States Constitution," to the extent that the labor costs occurred out-of-state, the withholding requirement would not apply to the portion of the contract identified as payments for labor costs related to the manufacture of the tangible personnel property while out-of-state.

Taxpayer cites *Gross Income Tax Division of Indiana v. Surface Combustion Corp.*, 111 N.E.2d 50 (Ind. 1953), for the Taxpayer's alternative reliance upon the Commerce Clause of the United States Constitution but, ignores the general rule that taxing interstate commerce is governed by four requirements: 1) the tax is applied to an activity with a substantial nexus to the taxing state; 2) the tax is fairly apportioned; 3) the tax does not discriminate against interstate commerce; 4) the tax is fairly related to the services provided by the state. *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). In the Taxpayer's situation, all four requirements are met. First, the Taxpayer has substantial nexus to this state as it is an Indiana business with its principal place business and the park at issue here within the state of Indiana. Second, the withholding tax is fairly apportioned to all Indiana residents who fall under IC 6-2.1-6-1. Third, the tax does not discriminate against interstate commerce because Indiana residents are required to collect the same tax for work done by Indiana residents. Fourth, the tax is fairly related to the services provided by Indiana.

Therefore, without proof that the ride manufacturer's workmen were present for the mere purpose of assembly the Taxpayer's constitutional argument must fail. Additionally; the facts meet the requirements set out in *Complete Auto* for a state's taxing without offending the Commerce Clause.

FINDING

Taxpayer's protest is denied as to the Indiana labor costs and sustained as to withholding on the out-of-state labor costs.

II. Sales/Use Tax – Application to income from lockers

DISCUSSION

Taxpayer protests the Department's assessment of the sales/use tax on the Taxpayer's rental lockers.

IC 6-2.5-2-1 provides in relevant part:

(a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
(b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

IC 6-2.5-3-1 provides definitions and states in relevant part:

(a) "Use" means the exercise of any right or power of ownership over tangible personal property.
(b) "Storage" means the keeping or retention of tangible personal property in Indiana for any purpose except the subsequent use of that property solely outside Indiana.

IC 6-2.5-4-1 provides in relevant part:

(a) A person is a retail merchant making a retail transaction when he engages in selling at retail.
(b) A person is engaged in selling at retail when, in the ordinary course of his regularly conducted trade or business, he:
    (1) acquires tangible personal property for the purpose of resale; and
    (2) transfers that property to another person for consideration.
(c) For purposes of determining what constitutes selling at retail, it does not matter whether: . . .
    (3) the property is transferred conditionally or otherwise.

IC 6-2.5-4-10 provides in relevant part:

(a) A person, other than a public utility, is a retail merchant making a retail transaction when he rents or leases tangible personal property to another person.

IC 6-2.5-4-4 provides in relevant part:

(a) A person is a retail merchant making a retail transaction when the person rents or furnishes rooms, lodgings, or other accommodations, such as booths, display spaces, banquet facilities, and cubicles or spaces used for adult relaxation, massage, modeling, dancing, or other entertainment to another person:
    (1) if those rooms, lodgings, or accommodations are rented or furnished for periods of less than thirty (30) days; and
    (2) if the rooms, lodgings, and accommodations are located in a hotel, motel, inn, tourist camp, tourist cabin, gymnasium, hall, coliseum, or other place, where rooms, lodgings, or other accommodations are regularly furnished for consideration.

The Taxpayer's argument regarding the imposition of sales tax upon the rental lockers is that the lockers are permanently attached to the Taxpayer's real estate and cannot be removed without causing damages to the premises or lockers. Thus, the lockers are not tangible personal property, which is the focus of the tax imposed by IC 6-2.5-4-10(a). The Department, while in no way conceding that the lockers are to be considered real property and only for the sake of illustration, would note that even if it accepted taxpayer's bare assertion-unsupported by statute, regulation, or case law- that the rental lockers are not tangible personal property, the underlying facts would demonstrate this to be a transaction involving the rental of accommodations for less than 30 days. Such activity would still be considered a retail transaction under, IC 6-2.5-4-4 thus rendering taxpayer's argument moot.

IC 6-2.5-4-1 is applicable to taxpayer's rental of these lockers, which is the rental of tangible personal property and which constitutes a taxable retail transaction. Therefore, the rental of the lockers is taxed pursuant to IC 6-2.5-2-1.

FINDINGS

Taxpayer's protest is denied.

III. Sales/Use Tax –Application to shuttle bus

DISCUSSION

Taxpayer protests the assessment of sales/use tax on the Taxpayer's purchase of a shuttle bus for use in Taxpayer's business.

IC 6-2.5-5-27 provides in relevant part:

> Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the persons acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

45 IAC 2.2-3-22 provides in relevant part:

> No vehicle shall be licensed by Indiana for highway use in Indiana unless the registered owner thereof shall present to the licensing agency at the time such vehicle is first licensed in his name proper evidence, as prescribed by the Department, of the payment of the state gross retail tax or use tax owing in respect to his acquisition of ownership of such vehicle, or shall then pay to such agency upon forms and receipts prescribed by the Department, the amount of any such tax owing and unpaid on the purchase of such vehicle.

45 IAC 2.2-5-61 provides in relevant part:

(a) The state gross retail tax shall not apply to the sale and storage or use in this state of tangible personal property which is directly used in the rendering of public transportation of persons or property.
(b) Definition: Public Transportation. Public transportation shall mean and include the movement, transportation, or carrying of persons and/or property for consideration by a common carrier, contract carrier, household goods carrier, carriers of exempt commodities, and other specialized carriers performing public transportation service for compensation by highway, rail, air, or water, which carriers operate under authority issued by, or are specifically exempt by statute or regulation from economic regulation of, the public service commission of Indiana, . . . ; however, the fact that a company possesses a permit or authority . . . does not of itself mean that such a company is engaged in public transportation unless it is in fact engaged in the transportation of persons or property for consideration as defined above.

Taxpayer relies upon IC 6-2.5-5-27 for the proposition that the purchase of its bus is exempt from the sales/use tax. Taxpayer maintains this position despite not being in predominantly engaged in the business of transporting property. The Indiana Tax Court has expressed a position contrary to that of the Taxpayer in *Panhandle Eastern Pipeline Company v. Indiana Department of State Revenue*, 741 N.E.2d 816 (Ind. Tax Ct. 2001). There, in discussing the exemption provided by IC 6-2.5-5-27, it was held, "if a taxpayer acquires tangible personal property for predominate use in providing public transportation for third parties, then it is entitled to the exemption. If a taxpayer is not predominantly engaged in transporting the property of another, it is not entitled to the exemption." *Id.* at 819. Therefore, although the bus may be primarily used for the transportation of the taxpayer's guests, since the Taxpayer is not predominantly engaged in the transporting of the property of another, it is not entitled to the exemption.

FINDINGS

Taxpayer's protest is denied.

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